

Claimant contends Judge Benedict erred. Claimant first argues the Board has jurisdiction to review the August 28, 2001 preliminary hearing Order as the issue is whether claimant sustained personal injury by accident arising out of and in the course of employment. Next, claimant argues the medical evidence is uncontradicted that the injuries for which he is seeking treatment resulted from the February 2001 work-related accident rather than from a subsequent non-work-related accident. Finally, claimant argues he was justified in leaving the accommodated job provided by respondent as it

required him to violate his medical restrictions against bending. Accordingly, claimant requests the Board to reverse the preliminary hearing Order and award him both medical benefits and temporary total disability benefits.

Conversely, respondent and its insurance carrier contend the appeal should be dismissed. Respondent and its insurance carrier argue that the Board does not have jurisdiction at this juncture of the claim to review these preliminary hearing issues. They contend the issue before the Judge was whether claimant's present need for medical treatment was caused by his work-related accident or by a later non-work-related event. They argue that such issue is a causation issue and, therefore, the Board lacks the jurisdiction to review such issue in an appeal from a preliminary hearing order. Respondent and its insurance carrier also contend the Board does not have jurisdiction at this stage of the claim to reweigh the evidence to determine whether claimant is entitled to temporary total disability benefits.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the preliminary hearing Order to determine if claimant's present need for medical treatment is due to the alleged February 20, 2001 work-related accident or the result of a subsequent non-work-related event?
2. Did claimant sustain personal injury by accident arising out of and in the course of employment?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes:

1. In February 2001, claimant was working for respondent as a certified nursing assistant. On February 20, 2001, claimant injured himself while repositioning a patient in bed. Claimant immediately reported the incident to his charge nurse. When claimant awoke the next morning he required assistance to get out of bed. Claimant reported his condition to respondent, who then referred claimant to Dr. Dick Geis for medical treatment.
2. Claimant testified that after the February 20, 2001 incident he experienced extreme pain in his mid-back, which extended up into his shoulders and through his neck, along with numbness in his right shoulder down through his arm and into three of his right fingers. But in the accident report, which is dated February 20, 2001, claimant only noted sharp pain between his shoulder blades.
3. Claimant also testified that he told Dr. Geis about having numbness in his right hand and arm. But Dr. Geis' medical notes from February 21, 2001, indicate that claimant provided a history of feeling a pull in the shoulders just below the shoulder blades at the

time of the accident. In that same medical note, the doctor diagnosed rhomboid and thoracic muscle strain and noted that claimant had no radicular symptoms in the arms or legs.

4. Claimant returned to work under Dr. Geis' medical restrictions against lifting over 15 pounds and repetitive bending and lifting, and respondent assigned him light work. But a portion of that work entailed providing oral and nail care to bedridden patients, which required claimant to bend and stoop. According to claimant, the bending and stooping aggravated the symptoms in his back and neck, and the numbness in his right hand.

5. The record does not disclose how many days claimant performed the light duty work. But on approximately February 26, 2001, claimant advised respondent about his inability to do the oral and nail care and that he could not work due to his pain. Respondent then gave claimant an ultimatum that he would either clock in and work or that he would be considered a "quit without notice." Claimant did not work after that incident and stayed home.

6. On March 5, 2001, claimant visited Stormont-Vail's emergency room for increased symptoms that occurred when he had sat down earlier that day. Claimant described the increased symptoms, in part:

Q. (Ms. Patton) And at that point, how -- describe how your symptoms had gotten worse.

A. (Claimant) To the point where I had complete numbness in my right arm and hand. I had severe pain through my neck, my shoulder. The pain was so severe that it extended from the mid[-]portion of my back to the side of my right ribs.<sup>1</sup>

The records introduced from Stormont-Vail indicate claimant reported to the emergency room with complaints of back spasms in the mid-lumbar region to the cervical region, and numbness in his right hand. The emergency room personnel's impression was lumbar spasm and lumbar pain.

7. After the emergency room visit, Dr. Geis referred claimant for nerve conduction studies and an MRI. Those studies were completed and indicated that claimant had a herniated cervical disc. Claimant last saw Dr. Geis on April 17, 2001.

8. A March 7, 2001 letter to Dr. Geis from claimant's physical therapist states that claimant experienced a reinjury at home on March 4, 2001, when he sat down and felt

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<sup>1</sup> Preliminary Hearing, July 11, 2001; p. 16.

immediate pain from the right buttock region all the way up to the right occipital region and since that time has complained of numbness and tingling in his fingers, pain in his right cervical region, right shoulder girdle, and pain in his right lower back.

9. Dr. Edward J. Prostic saw claimant at his attorney's request on June 11, 2001. According to a July 10, 2001 letter to claimant's attorney, the doctor believes the March 5, 2001 exacerbation of symptoms was a natural and probable consequence of the February 2001 work-related accident, which either caused or contributed to claimant's herniated cervical disc and thoracic outlet syndrome. Dr. Prostic wrote, in part:

. . . It is my opinion that the herniation of disc at C5 – 6 and the thoracic outlet syndrome were caused or contributed to by the February 28 [sic], 2001 injury at work. It is quite reasonable that his symptoms were then aggravated by being in the bent forward position to provide nail and oral care. Assuming that the patient's history is correct that he had an exacerbation of symptoms March 4 [sic], 2001 when he sat down in a chair at home, this should be considered the natural consequence of the underlying disease.

10. By Order dated July 12, 2001, Judge Benedict appointed Dr. Sergio Delgado to examine claimant and report whether claimant's "complaints are attributable to his work accident, or an intervening accident, and to make treatment recommendations." Dr. Delgado examined claimant on August 9, 2001, and promptly reported his findings to the Judge. The doctor reviewed various records including, among others, those from Dr. Geis, Stormont-Vail hospital, and two reports from Dr. Prostic. During the examination, claimant advised Dr. Delgado that he immediately developed pain in his neck that radiated into his right shoulder and back. Believing claimant had immediate neck pain following the February 2001 accident, the doctor concluded that claimant's complaints and herniated cervical disc were caused by that accident. The doctor did not specifically address the March 5, 2001 incident.

11. Dr. Prostic's opinion is presently the only expert medical opinion in the record that specifically addresses the March 5, 2001 flare-up of symptoms. And Dr. Prostic directly attributes claimant's herniated cervical disc and thoracic outlet syndrome to the February 20, 2001 accident. At this juncture of the claim, there is no expert medical opinion that claimant sustained a new and independent accidental injury on March 5, 2001. Although Dr. Delgado did not specifically mention the March 5, 2001 incident in his report to the Judge, he reviewed the medical records that addressed it. Therefore, Dr. Delgado was aware of the intervening accident issue.

12. The Board has jurisdiction to review the preliminary hearing finding regarding whether claimant's neck injury was caused by his work-related accident or an intervening event. The issue is tantamount to deciding whether claimant has sustained personal injury by accident arising out of and in the course of employment. Therefore, the Board

concludes it has jurisdiction pursuant to K.S.A. 44-534a. Based upon the record compiled to date, the Board concludes that claimant injured his neck in the February 20, 2001 accident and is entitled to workers compensation benefits for that injury.

13. But the Board does not have jurisdiction at this stage of the claim to redetermine the issue of whether claimant meets the definition of being temporarily and totally disabled. That issue is not a jurisdictional issue that may be appealed from a preliminary hearing order.<sup>2</sup> Nor did the Judge exceed his jurisdiction by denying the request for temporary total disability benefits.<sup>3</sup> Therefore, claimant's request to reverse the preliminary hearing Order to grant him temporary total disability benefits is dismissed.

14. By letter dated October 3, 2001, claimant's attorney forwarded to the Board a copy of Dr. Delgado's September 12, 2001 letter to Judge Benedict. By letter dated October 4, 2001, respondent and its insurance carrier's attorney objected to the Board considering Dr. Delgado's letter. That objection is sustained as the Board's review is generally limited to the issues and evidence that were presented to the Judge.<sup>4</sup>

**WHEREFORE**, the Board reverses the preliminary hearing Order and finds that claimant injured his neck in the February 20, 2001 work-related accident. The Board remands this claim to the Judge for further proceedings and orders on claimant's requests for benefits. The Board dismisses claimant's appeal of the denial of temporary total disability benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2001.

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BOARD MEMBER

c: Cynthia J. Patton, Attorney for Claimant  
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

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<sup>2</sup> See K.S.A. 44-534a.

<sup>3</sup> See K.S.A. 44-551.

<sup>4</sup> See K.S.A. 44-555c(a).